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No. 87-2066

# In the Supreme Court of the United States

OCTOBER TERM, 1987

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And W.S. KIRKPATRICK & CO., INTERNATIONAL,
Petitioners,

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the court below correctly held that the act of state doctrine does not bar adjudication of the instant litigation where:

(a) the action is a lawsuit between private American litigants concerning the Defendants' commercial bribery of Nigerians in order to deprive Plaintiff of a commercial contract with the Nigerian Air Force;

(b) the United States Department of State has advised the court below that it does not believe the act of state doctrine bars the court from adjudicating the dispute;

(c) the claims before the Court will require, at most, an inquiry only into the motivation behind, and not the legality of, the foreign government's action in awarding a commercial contract; and

(d) the *Bernstein* and commercial transaction exceptions to the act of state doctrine apply to this action.

2. Whether the court below correctly held that Plaintiff's Amended Complaint sufficiently pleads a RICO "pattern of racketeering activity" where:

(a) the Amended Complaint alleges—and related documents before the court establish—that Defendants agreed to pay, and thereafter paid, $1,764,019.58 in bribes violative of the Foreign Corrupt Practices Act in a series of eight payments over the course of eleven months to two Panamanian corporations and, thence, in a further series of payments, to or on behalf of a collection of Nigerian officials; and

(b) paragraph 57 of the Amended Complaint, based upon an open-court disclosure by the United States Attorney, alleges that "... the affairs of the [Defendants'] enterprises were also conducted through a pattern of racketeering activities ... in that [a Defendant] had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian contract ...".

## PARTIES TO THE PROCEEDINGS BELOW

Respondent Environmental Tectonics Corporation, International, is a United States Virgin Islands corporation and has a parent corporation as follows:

Environmental Tectonics Corporation, a Pennsylvania corporation.

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## CITATIONS OF OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 847 F.2d 1052. The Opinion of the United States District Court for the District of New Jersey is reported at 659 F.Supp. 1381.

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BRIEF IN OPPOSITION TO
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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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## STATEMENT OF THE CASE

### A. Procedural History

This is an action brought by Environmental Tectonics Corporation, International ("ETC" hereafter) against W. S. Kirkpatrick & Co., Inc. ("Kirkpatrick" hereafter), its corporate parents and its corporate DISC subsidiary, as well as two of Kirkpatrick's corporate officers and its two corporate sub-contractors and their respective officers, for violations of the

States Department of State as to the applicability *vel non* of the act of state doctrine. The parties responded with lengthy submissions in response to the specific questions posed by the court below (A. 174-282).

The State Department, likewise, responded to Judge Lechner's request in a letter dated December 10, 1986 and authored by former federal Judge Abraham Sofaer, Legal Advisor to the Department of State (A. 293). The submissions of the parties and the State Department were considered by the District Court, along with a Rule 56(f) affidavit by counsel for Plaintiff in relation to the act of state issue, thereby converting the Motions to Dismiss into a Motion for Summary Judgment pursuant to Rule 56 (A. 260).[3]

Following oral argument on March 19, 1987, the District Court filed its opinion and final order on May 1, 1987 rejecting various arguments made by the Defendants but granting summary judgment as to all Counts on behalf of all Defendants and against Plaintiff on the basis of the act of state doctrine; granting in the alternative Defendants' Motion to Dismiss as to the RICO Counts; and affirming in the further alternative the decision of the Magistrate who had allowed Defendant Carpenter to refuse to answer questions upon duly noticed deposition on the basis of Carpenter's alleged Fifth Amendment privilege (A. 469-520).

A timely notice of appeal was filed by ETC and argument was held with respect thereto in the court below on November 20, 1987. On May 2, 1988, the court below filed its opinion and Order in which it reversed the District Court on its act of state decision and its dismissal of the RICO and anti-racketeering claims.[4] On June 17, 1988, a timely Petition for Writ

3. Although Defendants' initial Motions to Dismiss were directed against Plaintiff's original Complaint, the courts below treated the Motions as if filed against the Amended Complaint (A. 472). Likewise, Defendants who had not theretofore joined in the Motions joined in them at the time of oral argument in the District Court (A. 474). Respondent takes no issue with either of those matters.

4. The court also reversed the decision by the District Court affirming the Magistrate's decision upholding an assertion of Fifth Amendment privilege by individual defendant Carpenter. That decision is not the subject of a Petition for a Writ of Certiorari in this Court.

of Certiorari to the United States Court of Appeals for the Third Circuit was filed by three of the corporate Defendants below.

**B. Statement of the Facts**

Defendant Kirkpatrick is a New Jersey corporation having its principal place of business in Fairfield, New Jersey (A. 92). Defendant DIC (HOLDING) Inc. ("DIC" hereafter) is a Delaware corporation which owns all of the stock of Kirkpatrick and which is, in turn, wholly owned by Defendant International Development Corporation, S.A. ("IDC" hereafter), a Luxembourg corporation (A. 92). Defendant W. S. Kirkpatrick & Co., International ("International" hereafter), is the DISC corporation organized by Kirkpatrick, DIC and IDC to be the contracting party on their behalf in connection with the transaction in question (A. 95).

Defendant Carpenter first became an employee of Kirkpatrick in 1954 (A. 95). By January 1978, he had become Chairman of Kirkpatrick's Board of Directors and its Chief Executive Officer (A. 95). In that year, on January 3, he sold all of his shareholder and equity interest in Kirkpatrick to DIC and entered into a consulting agreement/employment contract with Kirkpatrick and DIC whereby he continued as Chairman of the Board and Chief Executive Officer of Kirkpatrick through December 31, 1982 (A. 96).

During all pertinent times, Defendant Kirkpatrick sold and brokered equipment, parts and facilities relating to aircraft and aircraft facilities, both domestically and to airlines, airports and national air forces doing business outside the continental United States (A. 94-95). In 1980, while acting as Chairman and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity to sell aeromedical equipment, including ejection seat trainers, disorientation simulators and other devices, to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base, Nigeria (A. 100). At the time, Kirkpatrick had no independent capacity to design, build or supply such a facility; accordingly, beginning shortly thereafter, Carpenter and Kirkpatrick solicited the services of Defendant Emro, through

its president Ruppert, to act as the designer of the equipment and to provide engineering services incident to the Nigerian contract opportunity (A. 100). Likewise, Kirkpatrick lacked the independent ability to manufacture or supply the equipment to be provided to Nigeria; accordingly, during the same time period, Carpenter and Kirkpatrick solicited Defendant Nautilus Enviromedical Systems, Inc. ("Nautilus" hereafter), through its President Ross E. Saxon ("Saxon" hereafter), to act as the subcontractor, manufacturer and supplier of the medical equipment (A. 100).[5]

Kirkpatrick's competitor in the business of supplying aeromedical equipment and facilities, including the aeromedical equipment and facilities to be sold to Nigeria, is Plaintiff Environmental Tectonics Corporation, International, a Virgin Islands corporation having its principal place of business in Southampton, Pennsylvania (A. 91). Like the Defendants, ETC is engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment and facilities both domestically and to airlines, airports and national air forces outside the continental United States (A. 101).

In contrast to Kirkpatrick and its corporate relatives, however, ETC had the independent ability to design, manufacture, supply and install both the facility to house the aeromedical service and the component parts thereof (A. 101). Accordingly, on or about February 2, 1981, when it was disclosed that the Nigerian Air Force was contemplating the purchase of physiological training equipment for use at, and construction of, an aeromedical center at Kaduna Air Force Base, ETC immediately submitted *pro forma* pricing information to its agent which, in turn, forwarded that pricing information to the responsible Nigerian authorities (A. 104).

Regrettably, at or about the same time ETC was submit-

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5. In a submission to the District Court, Kirkpatrick has admitted that it fulfilled no more than 95% of its contract obligation under the Kaduna, Nigeria, contract. Kirkpatrick declares, however, that Nautilus is completing the construction of the aeromedical facility (A. 196).

ting its initial legitimate pricing proposal, Defendant Carpenter, acting on behalf of all Defendants, held meetings with Defendant Benson "Tunde" Akindele and one Alhaji Ringim, in which the following occurred (as reflected in Carpenter's contemporaneous memorandum of March 30, 1981) (A. 225-228):

> At the first meeting with Benson Akindele, we [Saxon and Carpenter] spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert, at some point in April or early May to finalize technical questions.
>
> We then got into the pricing, and we told [Benson] that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000.... We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".
>
> We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European concerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.[6]

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6. Defendants' bid, as accepted by Nigeria, was for $10,835,048.75 (A. 125).

Ross and I then went back to the hotel, and Ross recalculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus,[7] and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. . . .

At this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

* * * *

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that . . . the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and as-

7. Defendants ultimately paid a "commission" of $1,764,019.58 (A. 162).

sistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

In May 1981, less than two months after the meeting amongst Defendants and their representatives regarding the "commissions" discussed in the foregoing memorandum, two Panamanian bearer share corporations were established whereby, pursuant to written agreements, Kirkpatrick agreed to pay them a commission equal to 20% of the prices agreed to be paid by Nigeria for the aeromedical facility (A. 162). These corporations were controlled by Defendant Akindele for the sole purpose of receiving the "commission" payments from Defendants and making distribution of the sums thereby received (A. 160).

In July 1981, ETC pursued its endeavor to obtain the Nigerian contract by contacting the Armed Forces Attache of the Nigerian Embassy in Washington, D.C. (A. 160). In September 1981, ETC's President attended the International Congress on Aviation Medicine in Nancy, France, and while there met with Nigerian Air Force officials and reviewed with them the aeromedical needs at Kaduna (A. 160-161). In December 1981 ETC's president travelled to Lagos, Nigeria, for business meetings with Nigerian Air Force officials and to submit a formal bid on the Kaduna aeromedical contract (A. 161). In February 1982, ETC's president returned to Lagos and submitted ETC's final formal bid (A. 161).

Again, while ETC was pursuing ethical and legal avenues for obtaining the Nigerian business, Defendants pursued their criminal business methods. In addition to creating the two Panamanian bearer share corporations mentioned above,

Messrs. Akindele and Ringim continued to meet with Defendants. In particular, Defendants Carpenter and Saxon, acting on behalf of the Defendant corporations, met with Akindele and Ringim through at least March 5, 1982 and Defendants had agreed, as of September 1981, that their 20% "commission" on the Nigerian contract would be distributed as follows:

2½%—for Akindele
5 %—for air force
2½%—medical group
5 %—party
2½%—minister himself
2½%—other key defense personnel (A. 233)

On March 19, 1982, a contract was entered into between the Nigerian Ministry of Defense and Kirkpatrick's DISC corporation for purchase of the aeromedical equipment and turnkey construction of the facility at a total price of $10,835,048.75 (A. 162).

In September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of that contract; immediately thereafter, on September 30, 1982, by use of the United States mails and by means of wire transfers, Defendants, and each of them, caused payments in the amount of $117,929.34 and $193,657.70 to be made, respectively, to the Panamanian corporations Deriks and Los and, thereafter, caused those funds to be distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and to the Nigerian political and military figures in the proportions quoted above (A. 105).

In December 1982, Nigeria made the next progress payment on the contract; immediately, $290,486.50 was paid to each of the Panamanian corporations by Defendants and those funds were, likewise, distributed to, or on behalf of, Defendant Akindele and the Nigerian political and military figures in the proportions already described (A. 106).

In February 1983, Nigeria made its next progress payment; on February 2 payments in the amount of $145,243.27 were made to each of the Panamanian corporations and dis-

tributed therefrom in the amounts and for the purposes already described (A. 107).

Finally, in August 1983, Nigeria made its last progress payment and immediately—on August 8, 1983—Defendants caused payments of $290,486.50 to each of the Panamanian corporations and consequent distribution of those funds in the amounts and to the persons as described in Carpenter's March 8, 1982 memorandum (A. 107-108). The amounts distributed by Defendants to the Panamanian corporations, and thence to the intended "commission" recipients, totalling $1,764,019.58, equal 20% of the funds received by the Defendant corporations from Nigeria pursuant to the contract of March 1982 (A. 161-162).

In April 1983, upon becoming aware that its bid price to Nigeria for the aeromedical facility was several million dollars lower than the Kirkpatrick bid/contract price for the same equipment, ETC commenced an investigation as to the contract award and reported the facts it could learn to the Nigerian Air Force and to the United States Embassy in Lagos (A. 162). Subsequently, investigation ensued at the hands of the Federal Bureau of Investigation and the United States Justice Department. As a consequence, a plea bargain was struck involving both Defendant Carpenter and Defendant Kirkpatrick. As to Carpenter, he was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, that violation relating to the December 21 payments referred to above (A. 374). As to Defendant Kirkpatrick, it was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, that Count relating to the same December 1982 payments (A. 477).

In its Offer of Proof to support the guilty pleas in the United States District Court for the Distict of New Jersey (Rodriguez, J.), the United States and Defendant Kirkpatrick, by its present counsel, agreed that the evidence at trial would show that (A. 32-35):

> In 1981, Harry G. Carpenter, who was at that time

Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.

On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.

Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled, by Akindele to receive the payments from Kirkpatrick.

Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.

In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows: . . . [See p. 10, *supra.*]

The understanding Akindele communicated to Carpenter was that the payments were to be made to the above-cited political and military figures in Nigeria in order for W. S. Kirkpatrick to obtain the 10.8 million

dollar Aero medical contract from the Government of Nigeria (A. 32-33).

* * * *

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments was [sic] made as follows: . . . [See p. 10, *supra*.)

The payment charged in the information is the second payment. The second payment to Deriks and Los occured [sic] on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union International telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.[8]

Defendant Carpenter was sentenced to pay a fine of $10,000.00 and to perform 200 hours of community service (A. 28); corporate Defendant Kirkpatrick was sentenced to pay a fine of $75,000.00 over a period of five years commencing in January 1986 (A. 55).[9]

Upon learning of the guilty pleas by Defendants Carpenter and Kirkpatrick, ETC consulted counsel and filed the instant action in the United States District Court for the District of New Jersey on February 26, 1986 (A. 3).

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8. An essentially identical Offer of Proof, agreed to both by Defendant Carpenter individually and by his attorney, was filed with respect to Defendant Carpenter (A. 9-12). These Offers of Proof were both before the courts below and are of record in the respective criminal proceedings before the United States District Court for the District of New Jersey.

9. There is no evidence of record that either Defendant Carpenter or Defendant Kirkpatrick has complied with any or all of the sentences imposed by Judge Rodriguez.

## REASONS FOR DENYING THE WRIT

### I. THE COURT BELOW CORRECTLY HELD THAT THE ACT OF STATE DOCTRINE IS INAPPLICABLE TO THIS LITIGATION.

*First*, the act of state doctrine does not apply to this litigation because acts of bribery (and/or extortion) are not "acts of state" under any definition of that term. For example, as defined by the Restatement (Second) of Foreign Relations Law, the act of state doctrine proscribes examination by a court into ". . . the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." *Restatement (Second) of Foreign Relations Law*, §41. Comment d to Section 41 further refines the definition of "act of state" by saying:

> An "act of state" as the term is used in this Title involves the public interests of a state as a state . . . In determining whether an act is an act of state, the branch or agency of the government—executive, judicial, or legislative—that performed the act is not as important as is the nature of the action taken. . . .

Tentative Draft No. 7 of the Restatement of the Law Pertaining to Foreign Relations Law of the United States, §469, further refines this clear understanding of the meaning of the phrase "act of state" by saying:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other *acts of a governmental character* done by a foreign state within its own territory and applicable there. (Emphasis supplied.)

The Draft's exegesis of this definition in the following twenty-one pages (including parsing and analysis of this Court's act of state decisions) establishes that the doctrine

proscribes only inquiries into the legality *vel non* of formal acts of sovereign authority (*see, e.g.*, p. 61). The doctrine does not proscribe adjudication of the legality under United States law of conduct engaged in by United States citizens.

In this instance, it is conceded by the parties in their submissions in response to District Judge Lechner's inquiry that, first, one or more Nigerian criminal statutes concerning bribery have been violated by the conduct of Petitioners here put in question and, second, there is international agreement that bribery is criminal and, hence, outside international standards of commercial behavior (A. 174-259). That is, the Penal Code of Nigeria specifically makes criminal the offering or giving of gratification to a public servant (*i.e.*, bribery) and the taking of gratification (either directly or through an agent) by a public servant (*i.e.*, extortion). Glendhill, *The Penal Codes of Northern Nigeria and the Sudan* (1963) (A. 464-468). And, of course, the same laws make criminal the profiting, as did Petitioners here, by virtue of gratification (bribery or extortion). *Ibid.* (A.468)

In sum, as reiterated by the court below in its *Remington Rand* decision, acts of state consist of those "considered policy determinations by a government to give effect to its political and public interests." *Remington Rand Corporation-Delaware v. Business Systems, Incorporated*, 830 F.2d 1256 (3d Cir. 1987).

There can be no suggestion that—under the law of Nigeria, under the law of the United States of America, or under any international standard of jurisprudence—acts of bribery (or acts of extortion) constitute a considered policy determination by the country of Nigeria by which that country has given effect to its political or public interests. Therefore, the act of state argument in this case fails at the threshold.

*Second*, the act of state doctrine does not apply in this instance for the reasons articulated by State Department Legal Advisor (formerly District Judge) Sofaer in his letter sent to District Judge Lechner in response to Judge Lechner's

specific telephonic request. That is, as the United States, via the Solicitor General, has repeatedly urged upon this Court in *amicus curiae* briefs:

> [W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions. . . .
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added.)

As is recognized by the courts below, there is no issue in this litigation whereby the bribe-tainted contract is sought to be set aside or damages are sought against the Federal Republic of Nigeria. Rather, the sole issue even arguably touching upon conduct by a Nigerian official will be whether and to what extent the issuance of the contract to Petitioners was

motivated by the bribes paid and offered to be paid.[10] Thus, as is correctly determined by the court below, this case falls outside any understanding of the act of state doctrine.

*Third*, employment of the act of state doctrine to bar litigation of claims such as this—where the claim is grounded on conduct not only arguably in violation of the Foreign Corrupt Practices Act, but conduct which has been admitted in American federal criminal proceedings to have been violative of the Foreign Corrupt Practices Act in fact—would prove too much.

As Professor Bazyler prophesied in his article, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 380-381 (1980):

> Another important federal law regulating the practice of American business in the international marketplace is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA prohibits the payment of bribes by American businesses to officials of foreign governments on the grounds that such activities hurt rather than help our foreign commerce. . . .
>
> Private litigants may find, however, that their suits are barred by the act of state doctrine. Since the violation is, by definition, a payment to a foreign official, inherent in every private suit under the FCPA is the involvement of a foreign government. Adjudicating FCPA enforcement actions will nearly always require an examination of the reasons for the payment and the motivation of the foreign official in accepting the payment. Courts might therefore invoke the act of state doctrine as a convenient

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10. It is also noteworthy, of course, that no argument can be made that extortion of, or receipt of, bribes was within the scope of the Nigerian contracting officials' authority. And, even were there such an argument—as has been implied by Petitioners heretofore—such a fact would still relate only to the motivation for the award of the contract and not to its legal efficacy.

excuse to avoid deciding difficult FCPA cases.

If the act of state doctrine were to bar adjudication of a lawsuit between two competing American corporations [such as the parties here] where defendants engaged in commercial bribery of foreign officials in order to deprive plaintiff of a commercial contract [such as occurred here], the Foreign Corrupt Practices Act would be a statute without teeth and Congress' intentions in leveling the playing field for international business competition by the enactment of this statute would be thwarted. Indeed, if this were a suit against the country of Nigeria for damages there would be no immunity for Nigeria under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602, *et seq.* Hence, it would be anomalous—and it would not serve American policy interests—to give private defendants more consideration under the rubric of the act of state doctrine than a foreign government would receive in similar circumstances under the Foreign Sovereign Immunities Act.[11]

*Finally*, the *Bernstein* and commercial activities exceptions[12] to the act of state doctrine apply to the instant litigation. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2nd Cir. 1954). That

11. To the extent there is a conflict between the lower court's decision in this case and the decision of the United States Court of Appeals for the Ninth Circuit in *Clayco Petroleum Corporation v. Occidental Petroleum Corporation*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703 (1984), such conflict does not require resolution by this Court. Simply put, *Clayco* is wrongly decided perhaps, in part, due to the fact that the litigants there had each engaged in bribery in attempting to outdo the other for oil concessions and the Ninth Circuit might well have decided to leave each of them, and their unclean hands, where the facts found them. In any event, the expansive reading of the act of state doctrine by the *Clayco* court is inconsistent with this Court's decisions creating and construing the doctrine.

12. While neither the *Bernstein* exception nor the commercial activities exception has been adopted by a majority of this Court, both exceptions have been endorsed by still-sitting pluralities of this Court.

is, Judge Sofaer's letter[13] for the State Department plainly supplies the executive department predicate for the *Bernstein* exception. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 1813 (1972) (Mr. Justice (now Chief Justice) Rehnquist writing for himself, Chief Justice Burger and Mr. Justice White). The commercial activities exception, albeit rejected by the court below, also plainly applies to this transaction, we suggest. That is, albeit the contract in question is a military procurement contract, the contract is merely a commercial contract and not a contract whereby the sovereign power is vindicated as, for example, in an expropriation or legislative decree or executive fiat. In short, this contract falls within the Roman law of *jure gestionis* and is not *jure imperii*.[14]

In short, for each and all of the foregoing reasons, the act of state doctrine does not apply to this litigation, the court below correctly so ruled, and this matter is not worthy of this Court's attention.

## II. THE COURT BELOW CORRECTLY RULED THAT PLAINTIFF'S AMENDED COMPLAINT SUFFICIENTLY PLEADS A "PATTERN OF RACKETEERING ACTIVITY."

Mr. Justice White's now famous footnote in the opinion he authored for this Court in *Sedima, S.P.R.L. v. Imprex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985), framed the issue as to "pattern of racketeering activity" as follows:

> As many commentators have pointed out, the defini-

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13. Lest there be any doubt as to Judge Sofaer's understanding of the act of state doctrine, one need only read his opinion in *Sharon v. Time, Inc.*, 599 F.Supp. 538, 542-543 (S.D.N.Y. 1984) to be disabused of such doubt.

14. A further exception to the act of state doctrine not clearly articulated in other decisions or yet adduced by this Court is an exception where the foreign act arises out of fraud or corruption. *See, e.g., Sage International, Ltd. v. Cadillac Gage Company*, 534 F.Supp. 896 (E.D. Mich. 1981); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680 (S.D.N.Y. 1979). That exception would also plainly apply to this case.

tion of a "pattern of racketeering activity" differs from the other provisions in §1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," §1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. §3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

This footnote spawned a veritable cottage industry of learned commentary and judicial opinion writing. *See, e.g.*, Weissman, *Reflections on RICO Pattern Requirement After*

*Sedima*, 2 RICO Law Reporter 198 (1985); *The Pattern Requirement*, 16 RICO Law Developments (1986); *The Pattern Requirement*, 14 RICO Law Developments (1987); *Pattern*, 8 RICO Law Reporter 229 (1988). Indeed, as of this writing, this Court has granted *certiorari* in one case to consider the pattern requirement, *H.J., Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S.Ct. 1219, 56 U.S.L.W. 3647 (1988), and has pending before it eight Petitions, in addition to the present matter, all of which seek to bring the "pattern" requirement before this Court again. *See* Docket Nos.:

87-1051—*Hobson v. United States*, 825 F.2d 364 (11th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3594 (1987);

87-1262—*Rogers v. Liquid Air Corp.*, 834 F.2d 1297 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3632 (1988);

87-1350—*O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3672 (1988);

87-1358—*Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3654 (1988);

87-1478—*Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3707 (1988);

87-1530—*Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3722 (1988);

87-1742—*Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148 (8th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3823 (1988);

87-1854—*Cory v. Standard Federal Savings & Loan Asso-*

*ciation*, 843 F.2d 1386 (4th Cir. 1988) (unpublished opinion), *petition for cert. filed*, 56 U.S.L.W. 3823 (1988).

In a word, having opened the issue of Congressional intent in requiring a "pattern of racketeering activity", it now falls to this Court to resolve the issue.

While the cases summarized in the authorities cited in the preceding paragraph reflect a broad spectrum of views as to the meaning of "pattern", especially in regard to the twin requirements of continuity and relationship, the court below resolved the issue of "pattern" favorably to the plaintiff on the facts of this case. In doing so, the court below specifically followed its reading of the "pattern" requirement in *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987), as applied in the interim in *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666 (3d Cir. 1988). The *Barticheck* jurisprudence as to "pattern" had in turn been the culmination of a jurisprudential analysis over a series of cases in the Third Circuit in which the judges of that court (in particular Judges Higginbotham and Becker) had considered the interplay between continuity and relationship and had considered the opinions of the other Circuit Courts of Appeals and the other courts within the Third Circuit as the jurisprudence was developing. *See, e.g., United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1899 (1987); *Petro-Tech, Inc. v. Western Company of North America*, 824 F.2d 1349 (3d Cir. 1987); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F.Supp. 1412 (D.N.J. 1986), *rev'd*, 829 F.2d 1263 (3d Cir. 1987); *Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3654 (1988).[15]

In brief, the Third Circuit rejected a simplistic reading of "pattern of racketeering activity" and, construing the court's earlier authorities in the light of other federal courts' reasoning, laid down a fact-specific test as follows:

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15. This last decision is, of course, pending before this Court on a Petition for Writ of Certiorari at Docket No. 87-1358.

> . . . the existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as "continuous" and "related" but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. . . . *Barticheck*, 832 F.2d at 38-39.

The court below specifically rejected ". . . the position that a RICO pattern must involve two distinct unlawful schemes" and ". . . that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended. . . ." *Mendel*, 835 F.2d at 66.

In short, with respect to the continuity requirement of the "pattern" test, the court said:

> We read the legislative history's reference to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous." This determination necessarily depends on the circumstances of the particular case. *Id.* at 66.

Having developed this fact-specific test for determination of the "pattern" requirement in *Barticheck*, the court below ruled in this particular piece of litigation that:

> . . . To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id.* at 38-39; *Saporito et al. v. Combustion Engineering*, 843 F.2d 666, 676 (3d Cir. 1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged in the amended complaint—mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act—were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al.*, 835 F.2d 63, 66-67 (3rd Cir. 1987). But, to focus only on the series of payments—i.e., one bribe divided into four parts—is to ignore the complexity of Kirkpatrick's scheme. If the [Respondent's] allegations are true, a European conglomerate, and two American corporations—successfully, and over a two-year period—organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are also important considerations in this analysis. *See Barticheck*, 832 F.2d at 39. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829

F.2d 1263, 1268 (3rd Cir. 1987) (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Barticheck's* specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the statute.... *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063-1064 (3d Cir. 1988).

In the face of this fact-bound analysis of the racketeering activity in this commercial transaction with Nigeria, and notwithstanding the scope and number of corporations and persons involved, the instant Petition requests this Court to grant *certiorari* and reverse the court below by ruling, consistently with the most niggardly possible reading of the RICO statute and its "pattern" requirement, that a person damaged by racketeering activity may maintain a civil action against his wrongdoer only if the complaint "alleges multiple separate criminal schemes or episodes" (Petition, p. 11).[16] This reading of the RICO statute and its "pattern" requirement, while finding appellate favor with the Eighth Circuit, the Circuit as to which this Court has already granted *certiorari*, has been rejected by the court below and most other courts and commentators. Hence, this Court need not grant *certiorari* in the instant case; it need only—as it should—reverse the Eighth Circuit's narrow reading of the RICO pattern requirement and

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16. Of course, paragraph 57 of the instant complaint alleges multiple separate criminal schemes and episodes by these same Petitioners as follows:

> ... the affairs of the [Defendants'] enterprises were also conducted through a pattern of racketeering activities ... in that [a Defendant] had previously engaged in one or more racketeering activities on contracts unrelated to the Nigerian contract ...". (A. 111)

adopt as its own the highly fact-bound analysis of "pattern" and the subsidiary issues of "continuity" and "relatedness" developed and articulated by the Third Circuit in the light of the authorities cited above. As this Court noted in quoting from 18 U.S.C. §3575(e) in footnote 14 of the *Sedima* opinion:

> . . . criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 105 S.Ct. at 3285.

Here, the unlawful conduct by these Petitioners consisted of repeated acts of bribery having the same purposes, participants, victims, method of commission and results; the acts of these Petitioners as set forth in the pleadings below are plainly not "isolated" events—they constitute a "pattern of racketeering activity".

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should refuse the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit in this matter.

Respectfully submitted,

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